

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 27, 2020

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELE M.,

No. 1:19-CV-03081-JTR

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney D. James Tree represents Michele M. (Plaintiff); Special Assistant United States Attorney Alexis Toma represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See Fed. R. Civ. P. 25(d).*

1 JURISDICTION

2 Plaintiff filed applications for Disability Insurance Benefits and
3 Supplemental Security Income on January 21, 2016, alleging disability since
4 September 30, 2015 due to insulin-dependent diabetes, bipolar disorder,
5 depression, and back pain. Tr. 103. The applications were denied initially and
6 upon reconsideration. Tr. 153-56, 159-64. Administrative Law Judge (ALJ) Keith
7 Allred held a hearing on November 17, 2017, Tr. 51-79, and issued an unfavorable
8 decision on April 10, 2018, Tr. 15-28. Plaintiff requested review from the Appeals
9 Council. Tr. 214. The Appeals Council denied the request for review on February
10 21, 2019. Tr. 1-5. The ALJ's April 2018 decision became the final decision of the
11 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
12 405(g). Plaintiff filed this action for judicial review on April 22, 2019. ECF No.
13 1.

14 STATEMENT OF FACTS

15 Plaintiff was born in 1984 and was 31 years old as of her alleged onset date.
16 Tr. 27. She has a high school education and a work history consisting primarily of
17 cashiering and fast food work. Tr. 58, 501. She has struggled with diabetes since
18 she was a child and even with an insulin pump has had difficulty controlling her
19 blood sugars. Tr. 664, 921, 1034. In late 2015 she developed back pain and
20 eventually underwent surgery in April 2016 for a herniated disc. Tr. 633, 872, 990.
21 Though she initially experienced relief for a few months, by August her back pain
22 had returned and imaging revealed re-herniation of the disc. Tr. 1123, 1144, 1232-
23 33. After epidural steroid injections failed to provide relief, she underwent surgery
24 again in January 2017, for a laminectomy, discectomy, and spinal fusion of L4-5.
25 Tr. 1000, 1004, 1128. During the relevant period she also engaged in counseling,
26 and in 2016 completed a 12-week course of trauma therapy, which she reported to
27 be helpful. Tr. 66-67, 1176, 1180, 1215.

28 STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
24 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
25 four, the burden of proof rests upon the claimant to establish a prima facie case of
26 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
27 met once a claimant establishes that a physical or mental impairment prevents the
28 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),

1 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
2 to step five, and the burden shifts to the Commissioner to show (1) the claimant
3 can make an adjustment to other work; and (2) the claimant can perform specific
4 jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*,
5 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment
6 to other work in the national economy, the claimant will be found disabled. 20
7 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

8 ADMINISTRATIVE DECISION

9 On April 10, 2018, the ALJ issued a decision finding Plaintiff was not
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
12 activity since the alleged onset date. Tr. 18.

13 At step two, the ALJ determined Plaintiff had the following severe
14 impairment: diabetes mellitus, affective disorder, and spine disorder.² *Id.*

15 At step three, the ALJ found Plaintiff did not have an impairment or
16 combination of impairments that met or medically equaled the severity of one of
17 the listed impairments. Tr. 20.

18 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
19 she could perform light work with the following specific limitations:

20 lift/carry 20 pounds occasionally and 10 pounds frequently, sit for 6/8
21 hours and stand/walk for 6/8 hours, except the claimant can frequently
22 climb, balance, stoop, kneel, crouch, crawl.

23 Tr. 20.

24

25

26 ² Though the ALJ listed affective disorder as severe in this finding, the
27 explanation indicated that the ALJ actually found affective disorder to be non-
28 severe. Tr. 19-20.

1 At step four, the ALJ found Plaintiff was capable of performing her past
2 relevant work as a cashier and fast food worker. Tr. 26.

3 Despite making dispositive step four findings, the ALJ alternatively found at
4 step five that, based on the testimony of the vocational expert, and considering
5 Plaintiff's age, education, work experience, and RFC, there were jobs that existed
6 in significant numbers in the national economy that Plaintiff was capable of
7 performing, including the jobs of cleaner/housekeeping, packing line worker, and
8 production assembler. Tr. 27-28.

9 The ALJ thus concluded Plaintiff was not under a disability within the
10 meaning of the Social Security Act at any time from the alleged onset date through
11 the date of the decision. Tr. 28.

12 ISSUES

13 The question presented is whether substantial evidence supports the ALJ's
14 decision denying benefits and, if so, whether that decision is based on proper legal
15 standards.

16 Plaintiff contends the ALJ erred by (1) improperly evaluating the medical
17 opinion evidence; (2) failing to fully credit Plaintiff's testimony; and (3) failing to
18 properly assess the severe impairments at step two.

19 DISCUSSION

20 1. Plaintiff's symptom statements

21 Plaintiff alleges the ALJ erred in rejecting her symptom testimony without
22 providing adequate reasons. ECF No. 13 at 14-19.

23 It is the province of the ALJ to make credibility determinations. *Andrews v.*
24 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
25 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
26 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for
27 rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen*
28

1 *v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
2 (9th Cir. 1995).

3 The ALJ found Plaintiff's medically determinable impairments could
4 reasonably be expected to cause some of the alleged symptoms; however, he found
5 Plaintiff's statements concerning the intensity, persistence and limiting effects of
6 her symptoms were not entirely consistent with the medical evidence and other
7 evidence in the record. Tr. 22. The ALJ found Plaintiff's allegations to be
8 undermined by the records demonstrating resolution of her mental health issues
9 with treatment, the objective evidence regarding her back, her improvement
10 following her second back surgery, and her demonstrated daily activities. He
11 additionally found her diabetes to be controlled at times, and expressed skepticism
12 that Plaintiff was doing everything to manage her condition, and questioned
13 whether she truly had neuropathy. The ALJ also indicated Plaintiff's reported
14 limitations could have been complicated by obesity and pregnancy, rather than just
15 her back condition and diabetes. Finally, he found there to be evidence of possible
16 exaggeration, and found the record to suggest Plaintiff was not motivated to work
17 consistently. Tr. 22-24.

18 Plaintiff argues the ALJ's rationale is not supported by substantial evidence
19 and takes facts and findings out of context, particularly regarding the objective
20 findings of her back condition. She argues the ALJ's suggestion that Plaintiff was
21 non-compliant with her diabetes care is pure speculation, as none of her providers
22 mentioned non-compliance, and the discussion regarding whether she has
23 neuropathy or not relied on evidence from prior to the alleged onset date. ECF No.
24 13 at 17-19.

25 Defendant asserts the ALJ adequately explained his rationale, and notes
26 Plaintiff failed to challenge a number of the reasons, thus waiving her right to do
27 so. ECF No. 14 at 4-13.

1 The Court finds that the ALJ's reasoning is supported by substantial
2 evidence. In assessing a claimant's subjective symptom complaints, an ALJ may
3 consider the claimant's daily activities, precipitating and aggravating factors, and
4 the type and effectiveness of treatments. 20 C.F.R. §§ 404.1529(c)(3),
5 416.929(c)(3). A claimant's daily activities may support an adverse credibility
6 finding if the activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d
7 625, 639 (9th Cir. 2007). A limited work history and evidence that a claimant has
8 "shown little propensity to work in her lifetime" can be a specific, clear and
9 convincing reason for discounting her testimony. *Thomas v. Barnhart*, 278 F.3d
10 947, 959 (9th Cir. 2002). Although it cannot serve as the sole ground for rejecting
11 a claimant's symptom statements, objective medical evidence is a "relevant factor
12 in determining the severity of the claimant's pain and its disabling effects."
13 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The ALJ reasonably
14 interpreted the record in finding all of these factors to undermine the reliability of
15 Plaintiff's allegations. While Plaintiff argues for an alternative interpretation of
16 the record, the ALJ pointed to substantial evidence to support his interpretation.
17 "If the evidence can reasonably support either affirming or reversing a decision, we
18 may not substitute our judgment for that of the Commissioner." *Lingenfelter v.*
19 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotes and citation omitted).

20 While the Court agrees with Plaintiff that the ALJ's discussion regarding
21 possible non-compliance and the sufficiency of the neuropathy diagnosis are not
22 supported by substantial evidence, the ALJ offered sufficient additional reasons to
23 support his assessment. *See Carmickle v. Comm'r Soc. Sec. Admin*, 533 F.3d 1155,
24 1163 (9th Cir. 2008) (upholding an adverse credibility finding where the ALJ
25 provided four reasons to discredit the claimant, two of which were invalid); *Batson*
26 *v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming a
27 credibility finding where one of several reasons was unsupported by the record);
28 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is harmless

1 when “it is clear from the record that the . . . error was inconsequential to the
2 ultimate nondisability determination”). The ALJ’s finding that Plaintiff’s alleged
3 symptoms are not entirely consistent with the record is supported by substantial
4 evidence.

5 **2. Opinion evidence**

6 Plaintiff alleges the ALJ improperly rejected the opinion of Plaintiff’s
7 treating counselor and assigned undue weight to the state agency reviewing
8 doctors. ECF No. 13 at 9-14.

9 **a. *Treating counselor Ivonne Garcia, MHP, MSW***

10 An ALJ may discount the opinion of an “other source,” if he provides
11 “reasons germane to each witness for doing so.” *Molina v. Astrue*, 674 F.3d 1104,
12 1111 (9th Cir. 2012).

13 Plaintiff’s treating counselor, Ivonne Garcia, completed a medical source
14 statement in August 2017 regarding Plaintiff’s mental functional abilities. Tr.
15 1117-20. She opined Plaintiff had mostly mild to moderate limitations in her
16 ability to complete work-related functions, but stated Plaintiff would have marked
17 limitations in: her ability to work in coordination with or proximity to others
18 without being distracted by them; the ability to make simple work-related
19 decisions; and the ability to complete a normal workweek without interruptions
20 from psychologically-based symptoms. Tr. 1117-18. She further stated Plaintiff
21 was likely to be off-task 12-20% of the time during a work week, and would likely
22 miss three days of work per month. Tr. 1119.

23 The ALJ gave this opinion little weight, finding it to be inconsistent with the
24 numerous mental status examinations in the record, Plaintiff’s reported daily
25 activities, and Plaintiff’s improvement in mental functioning with treatment. Tr.
26 25. The ALJ also found Ms. Garcia’s opinion to be contradicted by the opinion of
27 examining doctor R.A. Cline offered three months earlier, which found Plaintiff’s
28 mental health issues had resolved. *Id.*

1 Plaintiff argues the ALJ should have given more weight to Ms. Garcia over
2 Dr. Cline because of Ms. Garcia's treating relationship with Plaintiff. ECF No. 13
3 at 12. She further argues the ALJ's finding of inconsistencies did not take into
4 account that Ms. Garcia's opinion referred to Plaintiff's ability to maintain mental
5 functioning over a sustained 40-hour workweek, whereas the mental status exams
6 and daily activities show only a snapshot of Plaintiff's abilities. *Id.* Finally,
7 Plaintiff argues that her improvement with treatment does not foreclose the ALJ
8 finding her disabled at least for a twelve-month period prior to her completion of
9 therapy. *Id.* at 13.

10 The Court finds the ALJ did not err in his evaluation. The consistency of a
11 medical opinion with the record as a whole and other opinion evidence is a
12 germane factor for an ALJ to consider in evaluating the weight due to an "other
13 source." 20 C.F.R. §§ 404.1527(f), 416.927(f). The various normal mental status
14 exams throughout the record and the contradictory opinion from Dr. Cline
15 constitute substantial evidence the ALJ was justified in relying on in according
16 little weight to Ms. Garcia's opinion. Furthermore, the ALJ reasonably found
17 improvement with treatment, as a few months before Ms. Garcia completed her
18 statement Plaintiff indicated treatment was successful and she was ready to stop
19 therapy and was considering returning to work. Tr. 1157-60, 1162. She had only
20 recently reengaged in services with Ms. Garcia due to needing assistance
21 processing a miscarriage. Tr. 1152. The ALJ did not err in his rejection of Ms.
22 Garcia's opinion.

23 ***b. State agency opinions***

24 At the initial and reconsideration stages, the state agency consulting doctors
25 found Plaintiff capable of performing light work with limitations on various
26 postural activities. Tr. 108-09, 134. The ALJ gave these opinions considerable
27 weight, finding them generally consistent with the medical record and Plaintiff's
28 daily activities. Tr. 24.

1 Plaintiff argues the ALJ erred in giving the most weight to the state agency
2 opinions, as they were based on only a portion of the record and preceded
3 Plaintiff's second back surgery after re-herniation of her disc. ECF No. 13 at 9-11.
4 Plaintiff argues the ALJ's conclusions that Plaintiff's second surgery was
5 successful and that the treatment records support the state agency opinions are not
6 supported by substantial evidence. *Id.* at 11.

7 In evaluating evidence from state agency consultants, ALJs may evaluate
8 these opinions in the same way that they assess other medical opinion evidence in
9 the file, including considering the supportability and consistency of the opinion.
10 20 C.F.R. §§ 404.1519a(b), 404.1527(c), 416.919a(b), 416.927(c). That is
11 precisely what the ALJ did in the present case. Plaintiff has failed to identify any
12 specific limitations that the ALJ omitted from the RFC that do not stem from her
13 subjective statements, which the ALJ gave sufficient reasons for discounting.
14 There are no other opinions in the file regarding Plaintiff's physical functioning.
15 The ALJ did not err in giving considerable weight to the state agency doctors.

16 **3. Step two**

17 Plaintiff argues the ALJ erred at step two by failing to find obesity to be a
18 severe impairment and making contradictory findings regarding mental health.
19 ECF No. 13 at 19-21.

20 At step two of the sequential evaluation process, the ALJ must determine
21 whether the claimant has any medically determinable severe impairments. 20
22 C.F.R. §§ 404.1520(a)(ii), 416.920(a)(ii). An impairment is "not severe" if it does
23 not "significantly limit" the ability to conduct "basic work activities." 20 C.F.R.
24 §§ 404.1522(a), 416.922(a). Basic work activities are "abilities and aptitudes
25 necessary to do most jobs." 20 C.F.R. §§ 404.1522(b), 416.922(b). "An
26 impairment or combination of impairments can be found not severe only if the
27 evidence establishes a slight abnormality that has no more than a minimal effect on
28 an individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.

1 1996) (internal quotation marks omitted). The step-two analysis is “a de minimis
 2 screening device used to dispose of groundless claims.” *Webb v. Barnhart*, 433
 3 F.3d 683, 687 (9th Cir. 2005).

4 Plaintiff argues the ALJ erred in failing to find obesity to be a severe
 5 impairment, despite her BMI over 40 and the ALJ implying obesity was
 6 contributing to back pain. ECF No. 13 at 20. Even if the failure to list obesity as a
 7 severe impairment was an error, the error would be harmless because step two was
 8 resolved in Plaintiff’s favor, and Plaintiff fails to identify any credited limitation
 9 associated with obesity that was not considered by the ALJ and incorporated into
 10 the RFC finding. *See Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055
 11 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).

12 Plaintiff also points to the ALJ’s inconsistent step two findings regarding the
 13 severity of her mental health impairments, arguing that the contradictory findings
 14 render the step two determination unclear and therefore erroneous. While the
 15 decision does list affective disorder as a severe impairment in the bold findings (tr.
 16 18), the discussion regarding the “paragraph B” criteria makes clear the ALJ found
 17 Plaintiff’s affective disorder to be non-severe. Tr. 19-20. Apart from challenging
 18 the ALJ’s disposition of Ms. Garcia’s opinion, Plaintiff fails to make any factual
 19 argument in favor of finding her mental health impairment to be severe. The ALJ
 20 appropriately discussed the evidence, made findings regarding the paragraph B
 21 criteria, and addressed each of the opinions in the file regarding Plaintiff’s mental
 22 health. Plaintiff has identified no specific legal error in the ALJ’s explanation.
 23 The Court finds the ALJ’s analysis to be supported by substantial evidence.

24 CONCLUSION

25 Having reviewed the record and the ALJ’s findings, the Court finds the
 26 ALJ’s decision is supported by substantial evidence and free of legal error and is
 27 affirmed. Therefore, **IT IS HEREBY ORDERED:**

28 1. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is

1 **GRANTED.**

2 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

3 The District Court Executive is directed to file this Order and provide a copy
4 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
5 and the file shall be **CLOSED**.

6 **IT IS SO ORDERED.**

7 DATED April 27, 2020.



A handwritten signature in black ink, appearing to read "J.T.R." or "John T. Rodgers".

8
9 JOHN T. RODGERS
10 UNITED STATES MAGISTRATE JUDGE

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28